No. 22364

In the

United States Court of Appeals

For the Ninth Circuit

BEVERAGE DISTRIBUTORS, INC., a corporation, *Appellant,* vs. OLYMPIA BREWING CO., a corporation, *Appellee.*	

On Appeal from the United States District Court
for the Northern District of California

Brief for Appellant

B. H. PARKINSON, JR.
DOUGLAS P. FERGUSON
ACKERMAN, JOHNSTON, NORBERG
& PARKINSON
206 Sansome Street
San Francisco, California 94104
Counsel for Appellant
Beverage Distributors, Inc.

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

Page

Jurisdictional Statement 1

Statement of the Case 2

1. Olympia's illegal exclusive distributorship territories and customer restrictions 4

2. Efforts of Olympia's other distributors to obtain Olympia's agreement to refuse to deal with BDI 5

3. Olympia instituted its wholesale fair trade program for the purpose of preventing BDI from competing for sales to customers illegally assigned by Olympia to other distributors 6

4. Olympia's refusal to deal with BDI was found to be for the purpose of preventing BDI from competing for sales to customers illegally assigned by Olympia to other distributors 8

Specification of Errors Relied Upon 10

Summary of Argument 11

Argument 11

1. Olympia's territorial restrictions constitute a per se violation of the Sherman Act, and it was equally illegal for Olympia to use the fair trade contracts and refusal to deal for the purpose of enforcing those territorial restrictions 11

2. The effect of the District Court's refusal to grant the injunctive relief sought by BDI is to preserve Olympia's illegal territorial and customer restrictions and to force compliance therewith by BDI 19

3. The District Court's refusal to grant injunctive relief against Olympia's illegal fair trade program, based as it was upon fundamental error of law, is reviewable de novo by this Court 22

Page

4. The District Court abused its discretion in balancing Olympia's desire to preserve its patently illegal distribution system against irreparable injury to BDI 25

Conclusion 31

Certificate 32

Exhibits in Record 33

TABLE OF AUTHORITIES CITED

CASES — Pages

Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 65 S. Ct. 1533, 89 L.Ed 1939 (1945) 17

American Cooperative Serum Ass'n. v. Anchor Serum Co., 153 F.2d 907 (7th Cir. 1946) 18

American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed 1575 (1946) 14

Barnett v. Equitable Trust Co., 34 F.2d 916 (2d Cir. 1929) 27, 28

Bergen Drug Company v. Parke, Davis & Company, 307 F.2d 725 (3d Cir. 1962) 24

Bowles v. Quon, 154 F.2d 72 (9th Cir. 1946) 27

Charles E. Hires v. Consumers' Co., 100 Fed. 809 (7th Cir. 1900) 18, 19

Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966) 17

Carroll v. American Fed. of Musicians of U.S. & Canada, 295 F.2d 484 (2d Cir. 1961) 28

Case-Swayne Company v. Sunkist Growers, Inc., 88 S.Ct. 528 (Dec. 1967) 16

Flintkote Company v. Lysfjord, 246 F.2d 368 (9th Cir. 1957) 14, 15

Hensley Equipment Company v. Esco Corporation, 383 F.2d 252 (5th Cir. 1967) 16

Manaka v. Monterey Sardine Industries, 41 F.Supp. 531 (N.D. Cal. 1941) 17

National Picture Theatres v. Foundation Film Corp., 266 Fed. 208 (2d Cir. 1920) 23

Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n., 155 F.2d 799 (3d Cir. 1946) 23

Ring v. Spina, 148 F.2d 647 (2d Cir. 1945) 22, 23, 31

Pages

Simpson v. Union Oil Company of California, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964) ... 14
Societe Comptoir De L'industrie etc. v. Alexander's Dept. Stores, 299 F.2d 33 (2d Cir. 1962) ... 24

United Mine Workers of Ameriea v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965) ... 17
United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1246 (1967) ... 2, 3, 6, 11, 12, 13, 16, 19, 25, 29, 30, 31
United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 64 S.Ct. 805, 88 L.Ed. 1024 (1944) ... 15
United States v. Bliss & Laughlin, Inc., 371 U.S. 70, 83 S.Ct. 156, 9 L.Ed.2d 120 (1962) ... 22
United States v. Borden Co., 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939) ... 17
United States v. Frankfort Distilleries, 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951 (1945) ... 15
United States v. General Dyestuff Corp., 57 F.Supp. 642 (S.D. N.Y. 1944) ... 15
United States v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966) ... 13
United States v. McKesson and Robbins, Inc., 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed 1209 (1956) ... 17
United States v. Minnesota Mining & Mfg. Co., 92 F.Supp. 947 (D. Mass. 1950) ... 17, 18
United States v. Reading Co., 226 U.S. 324, 33 S.Ct. 90, 57 L.Ed 243 (1912) ... 14

Walker Distributing Co. v. Lucky Lager Brewing Co., 323 F. 2d 1 (9th Cir. 1963) ... 14

STATUTES

15 U.S.C.:
§ 1 ... 15
§§ 1, 2 ... 1
§ 17 ... 17
§ 45(a) ... 15
§ 517 ... 17

Pages

28 U.S.C.:
§ 1291 2
§ 1337 2

Sherman Act, Section 1 17

Ocean Shipping Act, Section 146 17

Clayton Act, Section 7 22

7 U.S.C. § 852 18

No. 22364

In the

United States Court of Appeals

For the Ninth Circuit

Beverage Distributors, Inc., a corporation, *Appellant,* vs. Olympia Brewing Co., a corporation, *Appellee.*	

On Appeal from the United States District Court for the Northern District of California

Brief for Appellant

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on October 3, 1967, by the United States District Court for the Northern District of California, denying in part the appellant's application for a preliminary injunction pending trial (R. 294). The underlying action was brought under the antitrust laws of the United States (15 U.S.C. §§ 1, 2) for declaratory and injunctive relief, plus treble damages, by reason of appellee's anticompetitive conduct in institution of a wholesale fair trade program directed at appellant, followed by appellee's refusal to deal with appellant. The District Court's jurisdiction was invoked under 28 U.S.C. § 1337 (R. 1, 37, 90). The District Court's judgment of October 3, 1967, ordered the issuance of a preliminary injunction enjoining defendant's refusal to deal, but only up to a fixed maximum quantity, and denied the application for an injunction enjoining appellee's enforcement of wholesale fair trade price restrictions upon appellant (R. 294, 154). The appellant filed a timely Notice of Appeal under 28 U.S.C. § 1291 on October 10, 1967 (R. 263), and this Court's appellate jurisdiction rests upon 28 U.S.C. § 1291. Defendant has taken a cross-appeal from the injunction against its refusal to deal (R. 285).

STATEMENT OF THE CASE

This is a suit brought under the Sherman Act by Beverage Distributors, Inc. (BDI), a California corporation engaged in the wholesale distribution of beer and wine products, including Olympia beer, against Olympia Brewing Co. (Olympia), a beer manufacturer, for injunction, declaratory relief and damages. BDI sought a preliminary injunction against enforcement of Olympia's wholesale fair trade program and against Olympia's subsequent refusal to deal with BDI. At the time of this cut-off, BDI's sales of Olympia products represented 25% of its beer business (R. 63). Olympia has conceded that it entered into the fair trade program and then refused to deal with BDI for the purpose of preventing BDI from competing for sale of Olympia products to those of its retail customers which had theretofore purchased Olympia beer from Olympia's other wholesalers (*infra* at 8-10). The fair trading and refusal to deal were both means used by Olympia to enforce territorial and customer restrictions agreed upon between Olympia and its other California beer wholesalers, in per se violation of the Sherman Act as held in *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1246 (1967) (*infra* at 11-13). The District Court enjoined Olympia's refusal to deal, and BDI now appeals from denial of a preliminary injunction against enforcement of the fair trade program, which was admittedly entered into for the same purpose (*infra* at 6-8).

For over fifteen years BDI has distributed Olympia products in California (R. 63). Unlike some other Brewers whose products BDI handles, Olympia has a system of territorial and customer restrictions which—as applied to BDI—required BDI to limit its sale of Olympia products to Safeway Stores, Incorporated (R. 63, 70). BDI operates differently than almost all other beer distributors in California in that it delivers to retailers' central warehouses, rather than to individual stores (R. 63, 64). As the result of the efficiencies and limited-service nature of this method of competition, BDI is able to sell Olympia products at prices approximately 36¢ a case lower than do Olympia's other distributors in California (R. 65). None of them, other than BDI, sells below prices which Olympia has "suggested" over the years (R. 65).

In August 1967, following the decision of the Supreme Court in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1246 (1967), BDI served notice that it would no longer abide by Olympia's customer and territorial restrictions, and that it would compete by offering Olympia products to its other central warehouse customers (R. 64, 74). Upon receipt of BDI's letter, and because of BDI's intention to compete for the Olympia business of these other customers, Olympia immediately entered into fair trade contracts specifying minimum prices 36¢ per case higher than BDI's for wholesale sales in California (R. 64, 77; Plaintiff's Exhibit 3, excerpts from depositions of Phil Hannah, Olympia sales director, and Robert Schmidt, Olympia president, pages 15-19). For two or three weeks

BDI was unable to make any sales for its central warehouse distribution at the "fair trade" prices. However, eventually BDI did succeed in making a few sales at these prices and so placed further orders with Olympia (R. 65; Plaintiff's Exhibit 3, excerpt from deposition of Thomas Morgan, Olympia vice president, page 22). Upon receipt of these orders, Olympia notified BDI that it would no longer sell to BDI at all (R. 65, 83; Plaintiff's Exhibit 3, excerpts from depositions of Olympia executives Thomas Morgan, Phil Hannah and Robert Schmidt, pages 22-5).

1. Olympia's illegal exclusive distributorship territories and customer restrictions.

Over the years Olympia has carefully maintained a system of exclusive distributorship territories and customer restrictions designed to and having the effect of successfully preventing competition between its wholesale distributors. By Olympia's own admission, these territories are "well-defined geographical areas which are not overlapping" (affidavit of Thomas Morgan, Olympia vice president, confirmed by Phil Hannah, Olympia sales director, quoted at R. 43), and the territories have for some time been particularly described in maps and schedules kept within Olympia's custody (Plaintiff's Exhibits 1 and 2; testimony of Phil Hannah, Olympia sales director, in Plaintiff's Exhibit 3, page 3). Olympia's sales director can only recall two occasions within recent years on which more than one Olympia distributor attempted to compete for sales to the same customer (Hannah deposition, Plaintiff's Exhibit 4, pages 16-29). On those occasions Olympia was promptly notified of the incident by its field personnel, and, in each instance, by personal intervention in the territorial disputes, was able to persuade the distributors involved that competition between them was "economic idiocy" (testimony of Phil Hannah, Olympia sales director, in Plaintiff's Exhibit 3, pages 4-6; Hannah deposition, Plaintiff's Exhibit 4, pages 26-8). Those conflicts were quickly resolved by agreements dividing up the disputed accounts, and even after the filing of this action, Olympia's president admitted that Olympia had never considered abandoning or otherwise modifying its territorial system (testimony of Robert Schmidt, in Plaintiff's Exhibit 3, pages 3-4).

At no time during the hearing on preliminary injunction did Olympia present any evidence conflicting with its earlier admission that, with minor exceptions, it operates in California through a system of exclusive geographical territories. The District Court's own comments, after consideration of the evidence outlined above, indicate no doubt that Olympia was found to operate under such a system (R.T., pages 49-54, 57), and the finding of reasonable probability that such is true is set forth in the temporary restraining order which was continued in effect as the Court's preliminary injunction order (R. 152).

Because of such territorial and customer restrictions, BDI is the only beer distributor in California which has distributed Olympia products to customers' central warehouses at the lower prices permitted by that more efficient method of distribution. The result of Olympia's territorial and customer restrictions has been, therefore, to eliminate completely any price or service competition among its other wholesale distributors (R. 63-5; excerpts from Hannah deposition, Plaintiff's Exhibit 3, pages 4-6).

2. Efforts of Olympia's other distributors to obtain Olympia's agreement to refuse to deal with BDI.

Olympia's September 1967 decision to refuse to make further sales to BDI was the culmination of constant efforts by other Olympia distributors over the years. These storedoor distributors refused to engage in the central warehouse type distribution which would enable them to compete in price with BDI (R. 199). Rather, they and other distributors have for years attempted to destroy BDI. From time to time Olympia's president and Mr. Hannah, sales director, would discuss terminating BDI after Mr. Hannah would "catch hell" from a distributor for continuing to sell to BDI (excerpt from Schmidt deposition, quoted in Plaintiff's Exhibit 3, page 7). Olympia's distributors regularly brought up the subject in meetings with brewery officials (excerpt from Hannah deposition, quoted in Plaintiff's Exhibit 3, pages 8-9). BDI, according to Mr. Hannah, was "not going to win any popularity contests" (*id* at 10). Distributors resented the fact that BDI's sales of Olympia products to Safeway's central warehouse resulted in eventual distribution to Safeway stores within their exclusive territories (*ibid.*). This distribution to Safeway was an exception to the exclusive territorial arrangements which was bitterly resented (*id.* at 11-13).

3. Olympia instituted its wholesale fair trade program for the purpose of preventing BDI from competing for sales to customers illegally assigned by Olympia to other distributors.

On August 7, 1967, shortly after the United States Supreme Court's decision in *United States v. Arnold, Schwinn & Co.* made clear that BDI would be in violation of law if it were to acquiesce in Olympia's resale restrictions, BDI gave written and oral notice to Olympia of BDI's intention to compete with its low-cost method of distribution for the Olympia business of those of BDI's other customers having central warehouses and desiring to purchase from BDI (R. 64). Four days later, BDI was notified by Olympia that Olympia had instituted a wholesale "fair trade" program, under which BDI would not be able to offer its low-cost method of distribution to new customers or even to its existing customer, Safeway. As all other Olympia distributors had for years sold at identical prices "suggested" by Olympia, the sole effect of such "fair trade" program was to prevent the competition contemplated by BDI (R. 64-5; Hannah deposition, Plaintiff's Exhibit 4, pages 43-5). Olympia has conceded that the purpose of inaugurating its wholesale "fair trade" program in California was to prevent BDI from making any sales of Olympia products to customers (other than Safeway) located within the territories so allocated to other Olympia distributors and to prevent even a continuation of BDI's sales to Safeway: Olympia had no intention of fair trading at the wholesale level before BDI announced its intention to sell to others than Safeway (testimony of Robert Schmidt, Olympia president, in Plaintiff's Exhibit 3, page 14; testimony of Phil Hannah, R. 53), but when this announcement was received, Olympia moved fast to institute the fair trade program as soon as possible (testimony of Phil Hannah, Olympia sales director, in Plaintiff's Exhibit 3, pages 15-17). Counsel for Olympia admitted in open court during the preliminary injunction hearing that Olympia fair traded for the purpose of making it "difficult if not impossible for sales to be made by BDI" in competing with its method of distribution for Olympia business of its other customers (statement of David Toy, R.T., page 95). These admissions are confirmed by the timing of the fair trading and by the testimony of Olympia's president, who has conceded that the purpose of fair trading was to "ensure an orderly marketing of our product" by preventing BDI from competing for sales (testimony of Robert Schmidt, Olympia president, in Plaintiff's Exhibit 3, page 16). Olympia's sales director, who actively participated in the decision to fair trade and who urged even harsher sanctions against BDI's refusal to abide by existing customer restrictions, was aware that wholesale fair trading would probably destroy BDI's existing business with Safeway at the same time as it prevented BDI from acquiring any new customers in other distributors' territories (testimony of Phil Hannah, Olympia sales director, in Plaintiff's Exhibit 3, page 20). Mr. Schmidt decided, however, to fair trade following BDI's August 7th announcement, rather than, in his words, "cut them off entirely" (*id.* at 16-17).

4. Olympia's refusal to deal with BDI was found to be for the purpose of preventing BDI from competing for sales to customers illegally assigned by Olympia to other distributors.

The record clearly supports the District Court's conclusion that it was this same purpose—to protect the exclusive territories of Olympia's other distributors—which motivated Olympia in subsequently, in September, refusing altogether to make further sales to BDI when it appeared that BDI had succeeded in making a few sales at the fair trade prices. Olympia's sales director had urged earlier that BDI be terminated for announcing its intention to compete for business assigned by Olympia to other distributors (testimony of Phil Hannah, in Plaintiff's Exhibit 3, page 16), but had been overruled in favor of the fair trade strategy, and at first he was persuaded that such strategy had been successful in destroying absolutely BDI's ability to make further sales to Safeway (testimony of Phil Hannah, Olympia sales director, in Plaintiff's Exhibit 3, pages 23-4). A number of Olympia's other distributors had urged that Olympia refuse altogether to do business with BDI (*ibid.* at 7-10; *supra* at 5-6), and Olympia was well aware that those other distributors would be "unhappy" if BDI were permitted to sell, and succeeded in selling, to others than Safeway (testimony of Robert Schmidt, Olympia president, in Plaintiff's Exhibit 3, pages 19-20). Olympia's sales director's conclusion that "fair trading" would have the same result as outright termination was immediately communicated to interested Olympia distributors (testimony of Phil Hannah, Olympia sales director, in Plaintiff's Exhibit 3, page 21).

When Olympia received a few further purchase orders from BDI, however, the sales director and Olympia's executive officers considered that the fair trade contracts had not immediately and completely succeeded in eliminating BDI and that Olympia would "have to make a decision" as to whether to "ship or not to ship" (testimony of Thomas L. Morgan, Olympia vice president, in Plaintiff's Exhibit 3, page 22). In the ensuing discussion between Olympia's executives, it was brought to the attention of Olympia's president that the products being ordered were likely destined for resale within other distributors' exclusive territories and that those distributors "could very possibly be hurt" unless BDI was prevented from attempting to so expand its sales (testimony of Robert Schmidt, Olympia president, in Plaintiff's Exhibit 3, pages 26-7). In light of that danger, and based upon Olympia's conviction that free competition between its distributors would be a "very inefficient operation," the decision was made to terminate BDI altogether as an Olympia distributor (testimony of Robert Schmidt, Olympia president, in Plaintiff's Exhibit 3, pages 25-8). The effectiveness of that termination was insured by the cooperation of Olympia's other distributors in their subsequent unanimous refusal to fill purchase orders they had received from BDI (R. 127-8). Notwithstanding Olympia's denial of any participation in those subsequent refusals to deal, the record shows that all distributors who received such orders from BDI called Olympia before deciding what response they should give to BDI (testimony of Phil Hannah, Olympia sales director, in Plaintiff's Exhibit 3, pages 30-34; Plaintiff's Exhibit 14).

The District Court recognized that both the fair trade contracts and the subsequent termination were resorted to by Olympia for the same purpose, as is evidenced by the Court's own comments during the hearing on BDI's application for injunctive relief (R.T., pages 113-14[1]) and by the wording of the temporary restraining order which was continued in effect as the preliminary injunction (R. 152, lines 2-18). Just as both acts had the same purpose, the authorities discussed below will show both acts to be equally illegal. It will be shown that the District Court therefore erred in its legal conclusion that it was not free to enjoin the fair trade at the same time as it enjoined Olympia from further refusals to deal.

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in refusing to grant a preliminary injunction which would prevent Olympia from enforcing against BDI fair trade price restrictions upon the sale of Olympia products to retailers, since the fair trade program was admittedly instituted for the sole purpose of protecting and enforcing an illegal system of territorial restrictions.

2. The District Court erred in limiting its preliminary injunction against Olympia's refusal to deal with BDI by reference to a maximum volume figure based almost entirely on purchases made by BDI prior to its attempt to sell to customers assigned by Olympia to other distributors.

---

1. Note typographical error in hearing transcript: On page 113, lines 8-9, "to obstruct this" should read "obstreperous" and on line 16 "to obstruct BDI from" should read "obstreperous BDI."

SUMMARY OF ARGUMENT

It has been proven beyond doubt that Olympia maintains exclusive distributor territories and customer restrictions in California which are illegal under *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1246 (1967). Olympia admittedly instituted its fair trade program for the purpose of preventing BDI from competing for sales to customers illegally assigned under Olympia's agreements with other distributors (*supra* at 6-8). Subsequently, Olympia refused altogether to deal with BDI when it appeared that the fair trade program might not be entirely successful in achieving this objective (*supra* at 9). It was error of law, reviewable de novo and reversible on appeal, for the trial court to refuse to enjoin one means (fair trading) adopted to achieve the illegal object (enforcement of the illegal customer and territorial assignments to other distributors) while enjoining another means (refusal to deal) adopted to achieve the same object (*infra* at 22-5). Alternatively, even if the denial of adequate injunctive relief did not constitute error of law, it was a reversible abuse of discretion since the trial court based such denial upon a balancing of possible injury to Olympia's illegal distribution system—an improper consideration—against the proven irreparable injury to BDI.

ARGUMENT

1. Olympia's territorial restrictions constitute a per se violation of the Sherman Act, and it was equally illegal for Olympia to use the fair trade contracts and refusal to deal for the purpose of enforcing those territorial restrictions.

The facts as to Olympia's system of territorial and customer restrictions are proven almost entirely by testimony of Olympia executives and other evidence out of Olympia's own files (*supra* at 4-5). The District Court quite properly entertained no doubt that Olympia's restrictions constituted a violation of the Sherman Act. Counsel for Olympia admitted early in the preliminary injunction hearing that "any system whereby a manufacturer seeks to restrict resales to a particular territory or to particular outlets is a per se violation of the federal antitrust laws" under the United States Supreme Court's decision in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1246 (1967) (R.T., page 5), and the District Court later declared itself "pretty well satisfied" that Olympia had in fact violated the Sherman Act in the establishment and maintenance of its exclusive distributorship territories (R.T., page 80). Olympia had, in the District Court's opinion, "gone pretty far in the wrong direction, both before and after the bringing of this suit, as a matter of law" (R.T., pages 122-23). This conclusion is also set forth in the District Court's temporary restraining order, which now comprises the preliminary injunction order here on appeal (R. 152).

Olympia has admitted that it conducts its California resale operations through just such an illegal system of exclusive territories, and the evidence out of the mouths of the Olympia executives overwhelmingly corroborates the inescapable import of Olympia's territorial maps (*supra* at 4-5; R. 44-52; Plaintiff's Exhibits 1 and 2).

In *Schwinn*, the United States Supreme Court held that territorial restrictions such as those maintained by Olympia are "so obviously destructive of competition that their mere existence is enough" to violate the Sherman Act:

> "As the District Court held, where a manufacturer *sells* products to its distributor subject to territorial restrictions upon resale, a *per se* violation of the Sherman Act results. And, as we have held, the same principle applies to restrictions of outlets with which the distributors may deal and to restraints upon retailers

to whom the goods are sold. Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with which an article may be traded after the manufacturer has parted with dominion over it. *White Motor,* supra; *Dr. Miles,* supra. Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale. . . ." (*ibid.* at 1865).

In *United States v. General Motors Corp.,* 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966), the Court ruled illegal per se the efforts of a manufacturer and various distributors to procure the termination of a distributor who had violated restrictions upon the class of customers to whom he was permitted to sell by the manufacturer:

> "The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct. See Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U.Pa.L.Rev. 847, 872-885 (1955). Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed—as in Fashion Originators' Guild of America, Inc. v. Federal Comm'n, supra, 312 U.S., at 468, 61 S.Ct., at 708." (86 S.Ct. at 1331)

Given the per se illegality of Olympia's territorial restrictions, it was to be expected that BDI would be granted injunctive relief against both of the means used by Olympia to protect and enforce that illegal system—Olympia's fair trade program and its refusal to deal with BDI. This is so because the illegality of an agreement in restraint of trade extends to those acts, such as fair trading or refusal to deal, which are taken to further or enforce such restraints. It is too well accepted to admit of a contrary argument that acts which would otherwise be innocent are unlawful if done to give effect to a conspiracy illegal under the antitrust laws. In *American Tobacco Co. v. United States,* 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed 1575 (1946), the Court restated this doctrine (328 U.S. at 809):

> ". . . It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. . . ."

See also *United States v. Reading Co.,* 226 U.S. 324, 33 S.Ct. 90, 57, L.Ed. 243 (1912), among a number of other decisions which have set forth this doctrine. In *Simpson v. Union Oil Company of California,* 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964), a refusal to renew a lease was ruled illegal where such action was in furtherance of an illegal agreement under the antitrust law. In *Walker Distributing Co. v. Lucky Lager Brewing Co.,* 323 F.2d 1 (9th Cir. 1963), the Ninth Circuit Court ruled that a beer wholesaler is entitled to relief under the antitrust laws where one of the "intended and actual effects" of a brewer's agreements with other distributors is to cut off the wholesaler's supply. To similar effect is the Ninth Circuit Court's decision in *Flintkote Company v. Lysfjord,* 246 F.2d 368, 377

(9th Cir. 1957), holding that a manufacturer's refusal to sell cannot be excused under the Sherman Act as a "lawful exercise of the supplier's business judgment" when the evidence discloses the refusal to be pursuant to an agreement or understanding with other customers.

The District Court committed fundamental error in its conclusion that it was incapable of granting effective injunctive relief because of the "exemption" from antitrust laws enjoyed by fair trade contracts under the Miller-Tydings and McGuire Acts (15 U.S.C. § 1; 15 U.S.C. § 45(a)) (R.T., October 3, 1967, pages 10, 41-2). The fact that fair trade contracts may be exempted by the provisions of those statutes from illegality as price-fixing agreements, however, does not mean that they are exempted from illegality when used, as here, to effectuate a purpose unlawful under the Sherman Act in another respect. A leading decision to this effect is *United States v. Bausch & Lomb Optical Co.,* 321 U.S. 707, 64 S.Ct. 805, 88 L.Ed. 1024 (1944), which affirmed a lower court's injunction against the further operation of fair trade contracts which had been executed to further an illegal scheme of horizontal price fixing prior to enactment of a fair trade statute. The later decision in *United States v. Frankfort Distilleries,* 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951 (1945), also rules that the Miller-Tydings exemption is no defense to an antitrust action based upon the abuse of fair trade contracts to achieve the purposes of an illegal conspiracy. Similarly, in *United States v. General Dyestuff Corp.,* 57 F. Supp. 642 (S.D. N.Y. 1944), the rule permitting restrictive covenants in connection with a sale was held not to justify such covenants when used in effectuation of a conspiracy otherwise actionable. Only two weeks before the preliminary injunction hearing the principle stated in these decisions was applied by the Fifth Circuit in a case arising under the *Schwinn* decision with a result supporting BDI's application for adequate injunctive relief. In *Hensley Equipment Company v. Esco Corporation,* 383 F.2d 252 (5th Cir. 1967), a plaintiff suing for patent infringement was held barred from asserting its patent rights because of its abuse of patent privileges by establishing illegal customer restrictions similar to those of Olympia. The Court held that "this per se violation of the antitrust laws bars Esco from enforcing its patent" (at 264). Quoting from the *Schwinn* decision at length, the Fifth Circuit Court had no difficulty in dismissing the plaintiff's argument that the patent privilege rendered such restrictions exempt from the Sherman Act:

> ". . . As we understand the interplay of *Schwinn* and *Hartford-Empire,* and the underlying patent policy, there is no inquiry into purity of heart vs. bad motive, or market impact, or matters of what may seem to be essential fairness—a per se violation of the Sherman Act is deemed such a monopolistic action that the patentee is barred from enforcing the limited and special monopoly given him by the patent laws."
> (page 264)

The *Hensley* decision along with other decisions holding that an intent to accomplish an illegal object contaminates the use of otherwise legal means, including means specifically covered under specific "antitrust exemptions," were all briefed and argued before the District Court to no avail (R. 230). The Supreme Court has within the last month reemphasized the doctrine that exemptions from the antitrust laws are to be narrowly construed. In *Case-Swayne Company v. Sunkist Growers, Inc.,* 88 S.Ct. 528 (Dec. 1967), the Court points out that antitrust exemptions are "special exceptions to a general legislative plan" and therefore the courts are not justified in expanding the exemption. The same doctrine of narrow construction of exemptions—and specifically the fair trade exemption—was applied to limit the application of the fair trade exemption in *United States v. McKesson and Robbins, Inc.,* 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1956), in which the Court states:

> ". . . We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy. . . ."
> (351 U.S. at 316)

In the following decisions, activities exempt in themselves from operation of the antitrust laws have been held illegal where, as here, the exempt activity is used to achieve an illegal objective: *United States v. Borden Co.,* 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939) (agricultural cooperatives exempt under 15 U.S.C. § 17 from the antitrust laws held chargeable with violation of section 1 of the Sherman Act for conspiring with other groups); *Allen Bradley Co. v. Local Union No. 3,* 325 U.S. 797, 65 S.Ct., 1533, 89 L.Ed. 1939 (1945) (labor organization exempt under 15 U.S.C. § 517 from the antitrust laws held in violation of the Sherman Act by entering into contracts in restraint of trade with nonmember businessmen); see also *United Mine Workers of America v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Carnation Co. v. Pacific Westbound Conf.,* 383 U.S. 213, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966) (exemption of certain conduct of common carriers under section 146 of the Ocean Shipping Act from the antitrust laws held inapplicable to conduct found illegal therein); *Manaka v. Monterey Sardine Industries,* 41 F.Supp. 531 (N.D. Cal. 1941) (exemption from antitrust laws set forth in Fishermen's Collective Marketing Act held inapplicable); *United States v. Minnesota Mining &*

Mfg. Co., 92 F.Supp. 947 (D. Mass. 1950) (Webb-Pomerene Export Trade Act exemption from the antitrust laws held inapplicable); *American Cooperative Serum Ass'n. v. Anchor Serum Co.*, 153 F.2d 907 (7th Cir. 1946) (hog cholera exemption in 7 U.S.C. § 852 held inapplicable to marketing agreement which violated Robinson-Patman Act). Although the District Court found sufficient illegality in the territorial restrictions to warrant injunctive relief against enforcement of those restrictions through Olympia's threatened refusal to deal, it refused to deny Olympia its second weapon of the fair trade contracts which the record showed also to be practically effective to enforce the same illegal restrictions on competition.

The record on this appeal therefore demonstrates with singular clarity the complete inconsistency between (a) the District Court's finding of per se illegality and resultant injunction against a refusal to deal, and (b) the Court's refusal to also strike the fair trade contracts and its imposition of a quantity limitation upon the injunction granted. The situation is very little different from that which faced the Seventh Circuit Court in *Charles E. Hires v. Consumers' Co.*, 100 Fed. 809 (7th Cir. 1900), in which the District Court, after finding that the defendant's beverage product infringed upon that manufactured by the plaintiff, granted preliminary injunctive relief against defendant's further use of the infringing label, but refused to enjoin defendant's further sales of the infringing bottle. The Court of Appeals reversed that refusal to enjoin, holding that the trial court was legally compelled by its finding of infringement to accord adequate relief to the injured plaintiff:

> ". . . here the right is clear, the infringement proven, and but thinly disguised. It will be impossible to give compensation in damages; for, from the very nature of

> the case, it will be wholly impracticable to ascertain the extent to which the piracy upon the complainant's right has been or may be carried, or to what extent the product of the defendant has been or may be palmed off upon the public as the product of the complainant. Complete relief can only be afforded by restraint of the infringement. Besides, the court below found nothing in the circumstances or situation of the parties to stay its hand. It issued its writ of injunction according to their rights as it determined them. It fell short in its judgment of the extent of those rights. The writ was clearly intended by the court to go to the full extent of the infringement, and was not controlled by other considerations. . . ." (page 813)

Here, as in the *Hires* case, the District Court has failed to give the plaintiff adequate injunctive relief notwithstanding the Court's determination that the acts sought to be enjoined are clearly illegal. Based as it was upon the District Court's error of law as to the exemption enjoyed by the fair trade contracts, that refusal to strike those contracts must now be set aside.

2. The effect of the District Court's refusal to grant the injunctive relief sought by BDI is to preserve Olympia's illegal territorial and customer restrictions and to force compliance therewith by BDI.

BDI's letter to Olympia of August 7, 1967, made clear that BDI desired the freedom to compete for sales of Olympia products to all of its customers (R. 74-5). It is precisely this freedom to compete which the Supreme Court sought to protect in the *Schwinn* decision, and in fact the import of that decision was pointed out by counsel for BDI to Olympia's counsel before BDI's formal announcement of its intention to expand its sales (R.T., page 86). It is also this freedom which the District Court here properly decided was deserving of protection, and which it purported to protect by issuing the preliminary injunction that it did. By limiting its injunction to a set quantity maximum, however, and by allowing Olympia's "fair trade" contracts to stand, the District Court only sanctified and preserved the very illegality which it sought to strike down.

It is shown above (*supra* at 6-9), as it was in the preliminary injunction hearing, that BDI's singular appeal to retail customers is its ability to give central warehouse delivery without the confusion and delay attendant to store-door delivery, and thereby to permit efficient handling by the retailer at a saving in price. It is just this appeal which Olympia feared would permit BDI to compete successfully in other distributors' exclusive territories, and which Olympia sought to eliminate by its fair trade strategy (*supra* at 6-8). As already noted, Olympia had the further hope and belief that such fair trading would even discourage Safeway from doing business with BDI, in which event BDI would be destroyed entirely and Olympia's territorial restrictions would be subjected to no further attack (testimony of Phil Hannah, Olympia sales director, in Plaintiff's Exhibit 3, pages 20-21).

Olympia has not left to chance the possibility that fair trading would have such adverse effects on BDI, but rather has taken direct steps to replace BDI with other distributors wherever a retailer can be persuaded that BDI can no longer offer any competitive advantage. Immediately after fair trading, Olympia's field personnel began making calls on Safeway seeking to divert Safeway's business to the store-door type distributors handling the territories within which Safeway has its retail outlets (testimony of Phil Hannah, Olympia sales director, in Plaintiff's Exhibit 3, pages 34-5). Olympia was kept current on the success of this effort not only through the reports of its field personnel as to what Safeway sales were being taken from BDI (testimony of Phil Hannah, Olympia sales director, in Plaintiff's Exhibit 3, page 34), but also through numerous conversations with those distributors who had received Safeway purchase orders and had called to report the fact to Olympia (testimony of Phil Hannah, Olympia sales director, in Plaintiff's Exhibit 3, pages 36-8). At the time of the preliminary injunction hearing, Olympia had already succeeded in diverting the Safeway, Purity and Louis Stores business to other distributors (Plaintiff's Exhibits 12, 13, 14). What chance BDI might have to mitigate its losses by selling to others than Safeway, of course, is equally destroyed by the District Court's quantity limitation based upon previous sales, which effectively prohibits BDI from filling new orders during periods of comparable demand even if it should succeed in procuring them.

In effect, therefore, the District Court, by permitting Olympia to continue its fair trade program and by limiting the amount of beer which BDI may purchase from Olympia, has continued illegal restraints which Olympia could not lawfully impose and to which BDI could not lawfully submit. It has permitted Olympia almost complete protection of its illegal restrictions by (1) continuing the fair trade contracts which have destroyed most of BDI's business with Safeway and which effectively minimize the possibility of BDI getting any new customers, and (2) limiting the quantity which Olympia must sell to BDI so that BDI has no assurance of being able to supply new customers even if it somehow can get orders. BDI's competitive strength is thereby eliminated, and any threat which BDI may have posed to Olympia's illegal system of restraints upon competition is removed.

3. The District Court's refusal to grant injunctive relief against Olympia's illegal fair trade program, based as it was upon fundamental error of law, is reviewable de novo by this Court.

The trial court did not possess any discretion to deny a preliminary injunction on the basis of a clear error of law. The District Court's failure to enjoin enforcement of Olympia's fair trade contracts was an error of law similar to that which has impelled the appellate courts to direct the grant of relief in a number of similar situations. There is no presumption of validity accorded by the Appellate Court to a trial court's determination of a question of law. The nature of the de novo consideration of legal issues on appeal was well illustrated recently in *United States v. Bliss & Laughlin, Inc.,* 371 U.S. 70, 83 S.Ct. 156, 9 L.Ed.2d 120 (1962), in which the Supreme Court summarily vacated judgment denying a preliminary injunction in an antitrust proceeding and remanded the case to the District Court of the Southern District of California for reconsideration in light of the correct rule of law. The trial court had held that there had been a failure to prove reasonable probability of substantial lessening of competition by the purchase of assets of a corporation in a case involving section 7 of the Clayton Act. The Supreme Court in its opinion merely cited a recent case establishing the correct test.

In *Ring v. Spina,* 148 F.2d 647 (2d Cir. 1945), the Court of Appeals reversed the denial of preliminary injunction in an antitrust case, stressing that a denial of relief "based in substantial measure upon conclusions of law . . . can and should be reviewed by the Appellate Court. The Court states:

> "The granting or denial of an interlocutory injunction is usually relegated to the discretion of the District Court, which an appellate tribunal is reluctant to disturb. State of Alabama v. United States, 279 U.S. 229,

> 230, 231, 49 S.Ct. 266, 73 L.Ed. 675. But here the trial court's denial of the injunction was based in substantial measure upon conclusions of law which can and should be reviewed because of their basic nature in this litigation. Cf. Bowles v. Nu Way Laundry Co., 10 Cir., 144 F.2d 741; Bowles v. May Hardwood Co., 6 Cir. 140 F.2d 914; Coty, Inc. v. Leo Blume, Inc., 2 Cir., 24 F.2d 924; Schey v. Turi, 2 Cir., 294 F. 679. The case then should be remanded for action by the District Court in the light of the legal principles thus enunciated." (page 650)

Similarly, in *Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n.,* 155 F.2d 799 (3d Cir. 1946), the District Court had denied a preliminary injunction on the basis of a conclusion of law that there was not a sufficient showing of interference with interstate commerce in violation of the Sherman Act. The Appellate Court reversed, with direction to issue a preliminary injunction, on the ground that as a matter of law the plaintiff was entitled to the relief:

> "We think that the plaintiff not only has shown a case where 'fair play' indicates an injunction as stated by the District Court, but where as a matter of law it is entitled to such injunction. . . ." (page 803)
>
> "The order of the District Court is reversed and the cause remanded with directions to that Court to grant a preliminary injunction forthwith to the plaintiff against the defendants. . . ." (page 804)

As Judge Hough succinctly stated in reversing the denial of a preliminary injunction for error of law in an unfair competition case, "But here no fact is in doubt; there is before us only a question of law, and *law not only guides but coerces discretion." National Picture Theatres v. Foundation Film Corp.,* 266 Fed. 208 (2d Cir. 1920). The doctrine requiring the Appellate Court to step in to rectify erroneous legal conclusions is well set forth in *Societe Comptoir De L'industrie etc. v. Alexander's Dept. Stores,* 299 F.2d 33 (2d Cir. 1962):

> "Although the granting or denial of a preliminary injunction is within the discretion of the court to which it is addressed, where it is plain that the disposition was in substantial measure a result of the lower court's view of the law, which is inextricably bound up on the controversy, the appellate court can, and should review such conclusions. Ring v. Spina, 148 F.2d 647, 650, 160 A.L.R. 371 (2 Cir. 1945)." (pages 35-6)

As the Court of Appeals for the Third Circuit stated in *Bergen Drug Company v. Parke, Davis & Company,* 307 F.2d 725, 727, 728 (3d Cir. 1962), the public interest in enforcement of the antitrust laws weighs particularly heavily in favor of the grant of temporary relief in an antitrust case. The trial court in *Bergen* had denied a preliminary injunction on the basis of an error of law—that no "statutory or other legal basis" existed to grant the injunction. The Appellate Court reversed, holding that the Colgate rule did not apply to permit defendant to refuse to deal with plaintiff "in order to stifle the main action," an antitrust case, stating:

> "It is clear to us, based on the unchallenged facts in the record, that a temporary injunction should have been granted.
>
> "Private actions are an important means of enforcing the antitrust laws of the United States. Such actions are a vehicle for serving not only the immediate interests of the litigants, but the continuing interest of the public in a smoothly functioning and unobstructed system of commerce. Congress voiced its recognition of the importance of private actions by enacting special provisions for treble damages and attorneys' fees. That, indeed, weighs heavily with this court in considering whether equity jurisdiction should be exercised." (page 727)

The fact that the District Court enjoined one prong of Olympia's two-pronged anticompetitive conduct (the refusal to deal) did not in any way lessen its duty to enjoin the other prong of the anticompetitive conduct (the fair trade program). Indeed, the fact that the District Court did conclude that BDI was entitled to an injunction against the refusal to deal renders logically indefensible the Court's refusal to enjoin the fair trade program which was established for and achieves the very same illegal purpose (*supra* at 6-10).

In our case, the evidence is clear: Olympia's anticompetitive purpose in fair trading, as well as in refusing to deal, is proven out of the mouths of its top executives. The Supreme Court in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1246 (1967), has clearly enunciated that the territorial restrictions which Olympia sought to preserve constitute per se violations of the Sherman Act. Plaintiff is entitled as a matter of law to relief; yet the preliminary injunction gave relief against only one of Olympia's two illegal weapons for destruction of BDI. As we have shown, the trial court had no discretion to deny relief against both. There exists no presumption that the trial court was correct in its application of the law. Under these circumstances, the Court of Appeals will rectify the error of law by directing issuance of the injunction for which we have prayed.

4. The District Court abused its discretion in balancing Olympia's desire to preserve its patently illegal distribution system against irreparable injury to BDI.

Even if leaving in effect the fair trade program illegally designed to prevent BDI from selling Olympia beer to customers of other wholesalers were not error of law, as argued above, it was most certainly an abuse of discretion, for this compromise and ineffectual remedy was arrived at by the Court in deference to Olympia's illegal distribution system. The Court made this clear (R.T., pages 120-23):

> ". . . I am inclined to believe from what's before me that if your client not only gets supplies but also is in effect, by action of this Court, given immunity from rights deriving from state statute, that there may as a consequence be irreparable damage to Olympia, and that Olympia may lose what it has undertaken to build up over many years, and that is the good relationships with distributors. One thing I learned about the beer industry in the Schlitz case was that it is pretty important to have the goodwill of distributors to get your product on the shelves where the public will get it. And it's pretty hard, no matter how much you advertise and no matter how good your product may be, to make the grade without that.
>
> . . . .
>
> . . . .
>
> . . . .
>
> "Now I'm not saying that that desire justifies—I say it does not justify under the law—territorial obstruction contrary to Schwinn, or other practices contrary to law. But this is a state law which has as part of its underlying philosophy the idea of protecting the goodwill attending a mark such as Olympia or a name such as Olympia against the consequences of price-cutting. And if I at this point deny, in effect, by injunction the advantage of the state law to Olympia, they can make a strong case, it seems to me—and to you, too, I think—that this will irreparably damage them by causing distributors to not push their product, to not get the preferred space on the dealers' shelves, and so on and so forth. That may take a long time, because then. . . . Now, there's access to the consumer for Olympia products, because there's nothing that blocks the fulfillment of the demand created by their advertising, by what they undoubtedly believe is a superior product. But if

> as a consequence of the plaintiff in this case cutting prices, they lose that break on the shelves or that dealer cooperation through the distributing and servicing, no matter how good their product is and no matter how strong their advertising. It can just raise ned with them, and it's something, once the public gets off a particular brand, it's pretty hard to get back in, I suppose. So they have their problems in this matter.
>
> "Now, I am frank to say to you and to them, and Mr. Schmidt is here and his attorneys are here, that it looks to me like they have gone pretty far in the wrong direction, both before and after the bringing of this suit, as a matter of law. I am not talking about their morals, I am not saying I agree with the law that put them in this position. I am not sure that I do. But I don't make the laws; it is my duty to interpret them and apply them. But I am just loathe to use the power of this Court to do an act which may irreparably injure them."

In short, the trial court refused to enjoin an illegal fair trade program the sole purpose and effect of which was to preserve customer and territorial restraint of trade and competition.

In *Bowles v. Quon,* 154 F.2d 72 (9th Cir. 1946), this Court, in reversing the denial of an injunction, attempted to remove the mystique from the phrase, "abuse of discretion" by defining it (page 73): "An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." Thus the petitioner seeking a preliminary injunction is not asking for a dispensation of grace, either the grant or denial of which will be affirmed on appeal. Judge Learned Hand in *Barnett v. Equitable Trust Co.,* 34 F.2d 916 (2d Cir. 1929), had the following to say concerning appellate review of the trial court's exercise of discretion in the award of attorneys' fees (page 920):

> "It is argued that we should not disturb it, unless there has been an abuse of discretion. Perhaps so, but that phrase means no more than that we will not intervene, so long as we think that the amount is within permissible limits; if our conviction is definite that it is, we cannot properly abdicate our judgment. . . ."

Another explanation of the function of appellate review of the exercise of discretion is set forth in *Carroll v. American Fed. of Musicians of U.S. & Canada,* 295 F.2d 484 (2d Cir. 1961). In reversing the denial of a preliminary injunction, the Court pointed out, quoting Chief Judge Magruder, that, " 'Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." The Court went on to say (page 488):

> ". . . Congress would scarcely have gone to the pains of amending the Evarts Act, 26 Stat. 826, 828 (1891), which had provided interlocutory review over the grant or continuance of injunctions as an exception to the general requirement of finality, so as also to include their denial, 28 Stat. 666 (1895), and then of repeating the process when it enacted § 129 of the Judicial Code of 1911, 36 Stat. 1134, modifying 31 Stat. 660 (1900) in this respect, unless it had thought that meaningful duties were being imposed upon the Courts of Appeals. . . ."

As shown above, we believe that the Court was required by law to grant relief without balancing conveniences (*supra* at 22-5). Yet even if the Court were permitted to balance equities, it was an abuse of discretion to strike the balance which the Court made. BDI's proof of its irreparable injury cries for relief (R. 111-120, 250-58). On the other side of the scales, Olympia's own showing of the injury it claims it would suffer was an attempt to show economic justification for a distribution system which is illegal per se (*infra* at 30-31). In other words, as we will now show, Olympia proved absolutely no injury to merit consideration.

Upon looking to the proof which Olympia offered in support of its opposition to the preliminary injunction, the error in denial of adequate relief becomes most obvious. For Olympia's argument as to the injury it claims it would suffer if the injunction were granted has ignored the definitive holding of the Supreme Court of the United States in *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1246 (1967), that assignment of exclusive territories is illegal per se. The only claim of damage from denial of a preliminary injunction which Olympia is able to muster forth is a claim that Olympia will be injured if it must give up its illegal distribution system. Thus Mr. Hannah sets forth in his affidavit a fanciful argument in favor of the full-service distributor as against the central warehouse distributor (R. 199-202, 220-21). For over fifteen years, of course, Olympia has been willing to permit BDI to sell its products to Safeway on a central warehouse basis (R. 63-4). Thus it is the possible expansion of BDI's business which Olympia claims as injury—in other words, Olympia desires to prevent competition by BDI. Mr. Hannah sets forth what he claims will happen if BDI is permitted to make sales in territories assigned exclusively to other distributors: He expects that other distributors will lose business: "All other distributors . . . would, of course, lose the large retailers as customers" (R. 205).[2] He adds, "Un-

---

2. There is not the slightest evidence in this record that BDI intends to or could expand its business as speculated by Mr. Hannah. Obviously, it would be impossible to do so if other distributors would compete by offering retailers the efficient service BDI's customers desire.

doubtedly, Olympia's other distributors would find it economically impossible to make store deliveries to . . . small accounts" (*ibid.*). He makes it most clear that it is *competition* by BDI with other distributors which he fears: "Olympia has, therefore, been quite unwilling to see central warehousing extended in the State of California" (R. 202); the injury he foresees to Olympia would come from "the continued and expanding sales of BDI to all central warehouses in the State" (R. 206); "widespread extension of central warehousing" (R. 220, page 2); and "a shift to central warehousing" (R. 221). The speculative computations of monetary damage claimed for Olympia in the affidavit of Mr. Morgan are all based upon the fears and imaginings of Mr. Hannah as to what would happen if Olympia's exclusive territorial and customer restrictions upon wholesalers are invalidated so that BDI or other distributors like BDI may compete by attempting sales to customers presently assigned to other distributors (R. 227-9).

Olympia's points are arguments which attempt to support a distribution system declared by the Supreme Court to be illegal per se. In the *Schwinn* case itself the Court swept aside similar arguments as wholly inapplicable to a per se violation (87 S.Ct. at 1863):

> ". . . Schwinn contends, however, and the trial court found, that the reasons which induced it to adopt the challenged distribution program were to enable it and the small, independent merchants that made up its chain of distribution to compete more effectively in the marketplace. Schwinn sought a better way of distributing its product: a method which would promote sales, increase stability of its distributor and dealer outlets, and augment profits. . . ."

Olympia's argument of the irreparable injury it would suffer is almost a copy of that which had been made by

Arnold, Schwinn & Co. Yet the Supreme Court rejected Schwinn's argument as inapplicable to a per se violation (*ibid.*):

> ". . . But this argument, appealing as it is, is not enough to avoid the Sherman Act proscription; because, in a sense, every restrictive practice is designed to augment the profit and competitive position of its participants. Price fixing does so, for example, and so may a well-calculated division of territories. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). The antitrust outcome does not turn merely on the presence of sound business reason or motive. . . ."

The Court then ruled that Schwinn's arguments were inapplicable because territorial and customer restrictions are illegal per se (87 S.Ct. at 1865). So here, wholly irrelevant is Olympia's entire claim of damage it would suffer if the relief we seek should be granted. Olympia's claimed "damages" are nothing but an illegal advantage it would like to retain by maintaining illegal restrictions on distribution.

We submit that there is no balance to be struck at all. BDI's proof of irreparable injury is overwhelming and was accepted by the Court; Olympia can only say that it earnestly desires to continue to violate the law.

CONCLUSION

As in *Ring v. Spina* (*supra* at 22-3), the trial court's denial of a preliminary injunction against the illegal fair trade "was based in substantial measure upon conclusions of law which can and should be reviewed because of their basic nature in this litigation." Otherwise, the likelihood is that the trial court's basic error will be carried through the many months, and possibly years, until the trial on the merits and until remedied by this Court on appeal on the merits should plaintiff manage to survive so long.

Dated: January 26, 1968.

Respectfully submitted,

B. H. Parkinson, Jr.
Douglas P. Ferguson
Ackerman, Johnston, Norberg & Parkinson

By B. H. Parkinson, Jr.
Counsel for Appellant Beverage Distributors, Inc.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

B. H. Parkinson, Jr.
Attorney

(Appendix Follows)

Appendix

EXHIBITS IN RECORD

Exhibits	Identified, Offered and Received
Pl. 1	Tr. 20
Pl. 2	Tr. 20
Pl. 3	Tr. 40
Pl. 4	Tr. 40
Pl. 5	Tr. 40
Pl. 6	Tr. 40
Pl. 7	Tr. 60
Pl. 8	Tr. 83
Pl. 9	Tr. 134
Pl. 10	Tr. 138
Pl. 11	Tr. 140
Pl. 12	Tr. 140
Pl. 13	Tr. 140
Pl. 14	Tr. 141
Pl. 15	Tr. 142
Pl. 16	Tr. 142
Pl. 17	Tr. 149
Def. A	Tr. 5 (2d vol.)
Ct. 1	Tr. 132